

SOUTH AFRICA / JUDGMENT

Twizza (Proprietary) Limited and Others v Enoch Mgiijima Local Municipality and Others (3413/2018) [2020] ZAECHGC 144 (8 December 2020)

[2020] ZAECHGC 144

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

3413/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

No: 3413/2018

In

the matter between:

TWIZZA
(PROPRIETARY) LIMITED
First Applicant
CRICKLEY
DAIRY (PROPRIETARY) LIMITED
Second Applicant
FARMHOUSE
FROZEN FOODS CC
Third Applicant
KING
FISHER INDUSTRIES CC
Fourth Applicant
And
ENOCH
MGIJIMA LOCAL MUNICIPALITY
First Respondent
THE EXECUTIVE MAYOR OF
ENOCH MGIJIMA
LOCAL MUNICIPALITY

NOMINE OFFICIO,
BEING MS LULEKA
ELIZABETH
GUBHULA-MQINGWANA
Second Respondent
THE MUNICIPAL MANAGER
OF ENOCH
MGIJIMA LOCAL
MUNICIPALITY NOMINE
OFFICIO,
BEING MS NOKUTHULA CECILIA
MGIJIMA
Third Respondent
IN
RE
BORDER-KEI
CHAMBER OF BUSINESS
First Applicant
TWIZZA
(PROPRIETARY) LIMITED
Second Applicant
CRICKLEY
DAIRY (PROPRIETARY) LIMITED
Third Applicant
FARMHOUSE
FROZEN FOODS CC
Fourth Applicant
KING
FISHER INDUSTRIES CC
Fifth Applicant
SIGHTFULL
142 CC trading as SHELL
ULTRA
CITY
Sixth Applicant
ESKOM
HOLDINGS SOC LIMITED
First Respondent
THE
NATIONAL ENERGY REGULATOR
OF
SOUTH AFRICA
Second Respondent
ENOCH
MGIJIMA LOCAL MUNICIPALITY
Third Respondent
THE ADMINISTRATOR OF
ENOCH MGIJIMA
LOCAL
MUNICIPALITY NOMINE
OFFICIO

Fourth Respondent
LOCAL
MUNICIPALITY NOMINE OFFICIO
Fifth Respondent
THE ACTING MUNICIPAL
MANAGER OF ENOCH
MGIJIMA
LOCAL MUNICIPALITY NOMINE
OFFICIO Sixth
Respondent
IN
RE APPLICATION FOR CONTEMPT OF COURT

JUDGMENT

BESHE J:

[1] On the 12 December 2019, pursuant to an agreement between the parties in this matter, Mfenyana AJ issued an order (the order) in the following terms:

1. THAT the acknowledgement of debt and payment agreement (referred to collectively as “the payment agreement”) reached between the First Respondents (“Eskom”) and Third Respondent (“Enoch Mgijima Local Municipality”) and attached hereto marked “A” be and is hereby made an Order of Court.
- 2 THAT Eskom undertakes to supply electricity to Enoch Mgijima Local Municipality in the ordinary course, provided that Enoch Mgijima Local Municipality complies with the payment agreement (and excepting load shedding as may be scheduled nationally from time to time).
3. THAT Enoch Mgijima Local Municipality is to comply with the conditions contained in the payment agreement.
4. THAT Enoch Mgijima Local Municipality is to deliver written notice, on affidavit, to this Court, Mr Jacques van Zyl of Metcalf Sahd & Company by e-mail at jacques@msco.co.za, and Eskom (through its attorneys of record) on or before the 8th day of each month indicating and providing evidence of its compliance with its obligations under the payment plan, and its monthly current account obligations to Eskom.
5. THAT Enoch Mgijima Local Municipality and the Fourth and Fifth respondents are to nominate by name and designation, within 7 days of the granting of this order, the responsible person(s), by name, and designation, who are mandated to ensure compliance with the terms of this order and give effect thereto, by giving written details of such person’s name (or such persons’ names) and such person’s designation (or designations) to this Court, to Eskom (through its attorneys of record) and to the Applicants (through their attorneys of record).

6. THAT Enoch Mgijima Local Municipality is to pay the Applicants' costs of suit, (Wheeldon Rushmere & Cole Inc), (Netteltons and Smith Tabata), such costs to include the costs of two counsel on an opposed basis, and all reserved costs.
- [2] Details of the payment agreement that was reached between the first and third respondents are recorded in annexure A that formed part of the order.
- [3] The applicants allege that the respondents have not fully complied with court's direction inter alia that the Municipality (first respondent) makes an initial payment of R90 000 000.00 immediately, a further payment of R23 144 474.65 on 20 December 2019. That all current accounts due, should be paid by the last day of each month and an additional R 30 000.00 at the end of March, July and November each year until the debt is settled. It is common cause that the debt is owed to the first respondent in the main application, namely Eskom Holdings. It is also common cause that the respondents have not fully complied with the order. As a result thereof, the applicants approached this court for an order in the following terms:
- (a) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima are convicted of contempt of court for failing to comply with the order of Mfenyana AJ, dated 12 December 2019, under case number 3413/2018;
- (b) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima are sentenced to six months imprisonment, wholly suspended, on condition that they give effect to the order of Mfenyana AJ, dated 12 December 2019, under case number 3413/2018, within thirty (30) days of the granting of this order;
- (c) That should Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima not give effect to the said order within the specified time, that the applicant may approach the court on the same papers, duly amplified, for an additional order in the following terms:
- (aa) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima be held in contempt of court and that the second and third respondents be committed to prison for a period of twelve months, alternatively, for such a period as the Honourable Court may deem meet;
- (bb) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Noluthula Cecilia Mgijima are to pay the costs of this application, jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client;
- (d) That the first, second, and third respondents are to pay the applicant's costs of this application, jointly and severally, the one paying, the other to be absolved.

THE PARTIES

- [4] The applicants are businesses operating within the Enoch Mgijima Local Municipality (first respondent). They were co-applicants in the main application who were faced with looming electricity cuts by first respondent in the main application (Eskom) due to the non-payment by third respondent in the main application (Enoch Mgijima Local Municipality) of its electricity account. The amount due to Eskom stood at approximately R147 000 000.00.
- [5] The first respondent is the municipality, a municipality established pursuant to the Provisions of Section 155 of the Constitution, 1996, and in terms of the Provisions of Section 12 of the Local Government: Municipal Structures Act, 1998, and has its principal place of business at the municipal offices, 70 Cathcart Road, Komani, Province of the Eastern Cape.

The second respondent is the Executive Mayor (“the mayor”), cited herein nomine officio, in her capacity as the Executive Mayor of the municipality, being Ms Luleka Elizabeth Gubhula-Mqingwana, and in her personal capacity as well, given the nature of the application, with her main head office at the Municipal Offices, 70 Cathcart Road, Komani, Province of the Eastern Cape.

The third respondent is the Municipal Manager (“the municipal manager”) cited herein nomine officio in her capacity as municipal manager of the municipality, being Ms Nokuthula Cecilia Mgijima and in her personal capacity as well, given the nature of this application, with her main office at the Municipal Offices, 70 Cathcart Road, Komani, Province of the Eastern Cape.

EVIDENCE

- [6] It is common cause that the order that was issued by Mfenyana AJ was served on the attorneys of record of the respondents. It is also common cause that the respondents were aware of the order and started paying and reporting as required by the order (paragraphs 4 and 5 thereof) until February 2020. Payment was also made to Eskom in December in respect of the historical debt. In January and February payments were made in respect of first respondent’s current monthly obligations.
- [7] It therefore appears to be common cause that there has not been consistent compliance with the order. The respondents have stopped making payment as per the payment agreement.
- [8] It is on the basis of these common cause facts that the contempt application is made with a view to ensure compliance with the order.

RESPONDENTS’ DEFENCE

- [9] A reading of the opposing affidavit deposed to by first respondent’s Manager who is the third respondent reveals the respondents’ main defence as being the following:

Following an application between Let’s Talk Komani and various respondents, who included the present respondents, this court issued an order which inter alia made a recovery plan proposed by the parties an order of court. Mr Kenneth Lisle Clark who deposed to the founding affidavit was also the deponent to the founding affidavit in the Let’s Talk Komani matter. Respondents

contend that following the issuing of this order, an administrator assumed responsibility for the implementation of first respondent's financial recovery plan. In this regard they directed the court's attention to a document in which the terms of reference of the Administrator are recorded. The Administrator was amongst other things going to be representing the MEC responsible for Local Government and Traditional Affairs. He was to take over the functions of the Council in respect of Financial Management and Administration, in particular credit control and debt collection, supply chain management and implementation of the Financial Recovery Plan. The terms of reference also provide that the Municipal Manager will continue to perform her own powers that are not related to financial management but everything that has financial implications must first be ratified by the Administrator.

[10] It is on this basis that the respondents assert that they were precluded from complying with the order of the 12 December 2019. That this rendered the order unenforceable. That therefore the respondents are not in wilful and mala fide contempt of court's order. That this became the case with effect from 19 March 2020. To this end, respondents also contend that the Administrator should have been joined in these proceedings because the Administrator has a direct interest in the matter. Surprisingly though, Mr Rorke SC for the respondents submitted that the Administrator will not be at the centre of his argument.

[11] Another reason advanced by the respondents for the non-compliance with the order of the 12 December 2019 is the onset of the Covid-19 pandemic which led to the declaration of a state of disaster by the State President. Because, so the respondents allege, this had a devastating effect on first respondent's financial position. This being so because local authorities, being in the forefront of the fight against the virus, were required to spend enormous resources in this regard. Something that was wholly not anticipated. In limine, the respondents also complain about the non-joinder of Eskom. It is asserted that Eskom has a direct and legal interest in these

proceedings.

[12] It is common cause that third respondent was nominated as the responsible person for the purposes of paragraph 5 of the order of 12 December

2019. This is the person who was to ensure compliance with the terms of the order and to give effect thereto on behalf of the first respondent of course.

[13] The applicants' response to the respondents' main defence is that it has not been raised in good faith in that:

At no stage before this issue was raised in the opposing affidavit in August 2020, was it ever raised – namely the fact that the Administrator was required to comply with the order and not the second and third respondents. Not even in the Let's Talk Komani application. They point out that the Administrator was in place during 2019, hence the citing thereof in the main application. Yet the third respondent was nominated to ensure compliance with the order and give effect thereto and not the administrator.

DISCUSSION

[14] Does this raise a genuine dispute of fact? What constitutes a genuine dispute of fact? In *Plascon-Evans Paints v Van Riebeeck Paints*[1], the approach to be followed in adjudicating motion proceedings was suggested to be the following:

*“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto*, NO, 1972 (3) SA 585 (A), at p 882 D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd*, 1945 AD 420, at p 428; *Room Hire case*, supra, at p 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhotso v East Rand Administration Board and Another* 1983*

(4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries case*, supra at 924A).”

[15] As to what constitutes a genuine dispute of fact, in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[2] the following was stated:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment.”

Similarly, in *National Director of Public Prosecutions v Zuma*[3] the following was stated in this regard:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause

facts.

Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine

probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the

facts

alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[16] From the answering affidavit that was deposed to by first respondent's acting municipal manager in respect of the main application, it is clear that even at that stage, an administrator was in place. See in this regard paragraphs 12 and 13 of the said affidavit[4] where the following is recorded:

"12. More importantly, however, with the support of the national executive council, the executive council of the provincial government has intervened in the performance of the financial management function of the municipality in terms of sections 139(1)(b) and 139(5) of the Constitution of the Republic of South Africa Act, 1996.

13. In this regard, Mr Vuyo Mlokothe has been appointed by the provincial executive as the administrator of the municipality with effect from 14 September 2018 with a wide mandate to resolve the financial crisis at the municipality"

[17] It would appear that a resolution was taken that the Executive Council Intervention be "re-instated to the extent that it may have lapsed"[5] with a new administrator being appointed to inter alia implement the financial recovery plan. This was around February 2020. The terms of reference of the Administrator are annexed to

respondents' answer as AA5 and are undated. They however bear resemblance to those that are referred to in the answering affidavit filed in respect of the main application - which were in respect of the "former" administrator - that was in place at the time.

[18] It is common cause as I pointed out earlier in this judgment that the third respondent was nominated on behalf of the first respondent to ensure compliance with the court order. We also know that there was compliance with the court order until February 2020.

[19] On the 26 March 2020, third respondent penned a letter that was addressed - "To who it may concern". She was reporting about the first respondent's financial position. At page 8, the following is recorded:

“This is one of the reasons why the municipality cannot at the moment pay its creditors as they fall due including Eskom accounts. The municipality has now appointed service providers to increase revenue from the electricity customers with the introduction of smart meters in all households and businesses, to start in April 2020.”

No reference is made to the role of the Administrator. In a letter addressed to the applicants’ attorneys of record in which reference is made to the abovementioned letter addressed “to whom it may concern”. The letter records that the municipality’s position has since worsened “due to the economic hardships caused by the Covid-19 pandemic and prevailing lockdown”. Once again, no mention is made of powers / role of the administrator hampering compliance with the order by the respondents.

[20] Third respondent seeks to explain this anomaly by alleging that it was due to an omission on her part that the municipality’s attorneys of record were not informed timeously about the appointment of the administrator. There is however no suggestion that the report that was addressed “to whom it may concern” was drafted by the respondents’ attorney of record. It emanates from the office of the third respondent and it is signed by her. It has to be borne in mind that this is respondents’ main defence in the matter. One would have expected that it be raised at an early stage when issues of non-compliance arose and were sought to be explained. What are the chances of third respondent omitting to mention firstly in her report and to first respondent’s attorney of record namely that we are unable to ensure compliance with the order due to the role that has

been assumed by the administrator.

[21] The undated terms of reference of the administrator that the court’s attention is directed to, make it plain that –

4 (b) The Municipal Manager will continue to perform her other powers that are not related to financial management but everything that has financial implication must first be ratified by the Administrator. There is no evidence that any attempts were made to get the administrator to ratify compliance with the order.

No indication is given as to what steps were taken in light of there being an administrator to “ensure compliance with the order” by the person tasked with this responsibility. It is therefore my considered view that this defence is not raised in good faith – that it is not a bona fide / genuine dispute of fact.

[22] Regarding the second reason put forward by the respondents for the failure to comply with the order the following is noteworthy:

The next payment that was due to Eskom was to have been made on or before the 31 March 2020. The state of disaster was declared on the 26 March

2020. On the 26 March 2020, first respondent's attorney of record addressed a letter to the applicants via their attorneys of record and stated that "As matters stand, the municipality will have to report to the Court that it is unable to comply with its obligations and to seek an appropriate relief from the Court". In this letter the respondents complain that payments made to Eskom have had a debilitating effect on the municipality's ability to pay its normal operational expenses. The letter also makes reference to the outbreak of Covid-19 and the government legislated response to the outbreak and two Government Gazettes that are said to be dated 25 March 2020. Further that "this will place a considerable further strain on the municipality's fragile financial position". [my emphasis] There are no details of what resources and to what extent were utilized towards the Covid-19 pandemic, if any, at that stage –the letter having been penned the same day that the state of disaster was announced by the State President. Clearly as the letter suggests need to take urgent measures to deal with the outbreak of the pandemic was at that stage still anticipated.

This defence too cannot absolve the respondents from complying with the order. It could not have rendered the respondents unable to comply with the order at that stage. Respondents complain that payment to Eskom in terms of the order has had a "debilitating effect on the municipality's ability to pay its normal operational expenses". This begs the question - Why then did the first respondent agree to the terms of the order and the confirmation of the payment plan knowing that it could not keep up with the payment plan. Can it not be said that this is an indication that even at that stage there was no intention to comply with the order. As counsel for the applicants suggests – they agreed only to relieve the pinch of shoe at that stage or for the time being.

[23] It is trite that "the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions should always be maintained".[6] It is also trite that before a person can be declared to be in contempt, the breach or failure to comply with a court's order

should be accompanied by mala fides and wilfulness of the part of the person in failing to comply with the order. Mala fides of the part of the respondent should be proved beyond reasonable doubt.[7] It was submitted on behalf of the respondents that they have advanced evidence which establishes a reasonable doubt as to whether the non-compliance with the order was mala fides and wilful. I have already expressed a view that the defences raised by the respondents do not seem to have been raised in good faith. In my view both are implausible for reasons that I have already stated. The credibility of the respondents or their defences is further impacted on by the undisputed evidence that came to the attention of the applicants a few days before this application was to be heard. Namely that the first respondent was paid its equitable share by the National Treasury in July 2020 an amount of R89 000 000.00. Surprisingly, the current Administrator Mr Monwabisi Somane, whilst confirming the payment of the equitable share in July 2010, states that this "further developments" only came to light after he had deposed to his previous affidavit on the 14 August 2020. There is also no mention of this development in the opposing affidavit that was deposed to by third respondent, also in August 2020. The question is,

if the respondents were intent in complying with court's order but for reasons they cited, why do they not disclose that conditions pertaining to first respondent's financial position have improved. And expressed their preparedness to comply with the court's order. How can it be that both the Administrator and the Municipal Manager were not aware of the first respondent has been paid its equitable share in August when they deposed to affidavits in respect of this application. This in my view shows beyond reasonable doubt that the non-compliance with the order was wilful and mala fides.

[24] The issue of the non-joinder of the Administrator and Eskom was not pursued with any vigour during argument. But the short answer thereto is that contempt of court proceedings are not necessary proceedings between the parties in the matter from which the order emanated. But is between the court and the person who is alleged to be in contempt of court. As was pointed out in *Fakie NO v CCII Systems (Pty) Ltd supra* at paragraph [7]: that contempt of court proceedings permit a litigant who has obtained a court order, to approach a court in the event on non-compliance for an order declaring the uncompliant party to be in contempt of court. That is what the applicants have done – applied for an order for the respondents to be declared to be in contempt of court.

[25] In the circumstances, I am satisfied that the applicants have made out a case for the order that they seek.

[26] Accordingly, an order in the following terms will issue:

(d) That the first, second, and third respondents are to pay the applicant's costs of this application, jointly and severally,

the one paying, the other to be absolved.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants : Adv: I J Smuts SC & Adv: G Brown

Instructed by :

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For the Respondents : Adv: S Rorke SC

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Date Heard : 3 September 2020

Date Reserved : 3 September 2020

Date Delivered : 8 December 2020

[1]

[1984] ZASCA 51; 1984

(3) SA 623 AD at 634 H – 635 C.

[2]

[2008] ZASCA 6; 2008

(3) SA 371 SCA 375 [13].

[3]

[2009] ZASCA 1; 2009

(2) SA 277 SCA 290 [26].

[4] Page 178 of the papers annexure AA6 to the opposing affidavit.

[5] Page 124 Annexure AA2.

[6]

[1995] ZACC 7; 1995

(4) SA 631 CC at 655 A – B.

[7] *Fakie NO v CClI Systems (Pty) Ltd* 2006 (4) 326 SCA at 344 where the court stated: (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements. (b) The respondent in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings.

- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt. (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

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Prepared on 12 October 2026 · Esheria